REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

[Coram: A. C. Mrima, J.]

CIVIL APPEAL NO. 1 OF 2019

BETWEEN

TRANS MARA SUGAR CO. LTD.....APPELLANT

AND

TAFROZA MBONE LIDAVA.....RESPONDENT

(Being an appeal from the judgment and decree by Hon. R. Odenyo Senior Principal Magistrate in Migori Magistrate's Civil Suit No. 2707 of 2015 delivered on 5/12/2018)

JUDGMENT

1. On 17/09/2019 this Court gave directions in **Migori High Court Civil Appeal No. 10 of 2019 Trans Mara Sugar Co. Ltd vs. Nelson Dedege Mbai.** One of those directions was that the judgment in the said appeal do apply to this appeal on similar issues. The judgment dealt with three issues.

2. The first issue was the effect of a contract not signed by the farmer on the execution part which was on the last page although the contract was signed by both the farmer and the miller at the foot of every single page. The second issue was the interplay between the contract and the **Sugar Act** on the duty of harvest the cane. The contract vested that duty on the farmer whereas the **Sugar Act** vested the duty to harvest the cane on the miller. The third issue was whether transport charges attracted 16% VAT in the financial year 2013/2014.

3. This Court found the contract valid. It also found that the miller had the duty to harvest the cane since the contract could not override a statute. On the third issue this Court found that the 16% VAT on transport charges was applicable in the financial year 2013/2014. I hence incorporate the said judgement herein by reference.

4. In this appeal, the issue of the unsigned contract was raised. The issue of the duty to harvest the cane was also raised. There was however another new issue. That was whether the Respondent had been fully paid for the second ratoon crop. As stated, the first two issues in this appeal were settled in **Migori High Court Civil Appeal No. 10 of 2019** (supra). I will now deal with the last one.

5. The Appellant contended in its submissions that it had paid the Respondent the value of the second ratoon crop and as such no liability attached to the Appellant. It further stated that it had annexed the Respondent's statement in the submissions showing that the second ratoon was harvested on 19/09/2012. The said statement was however not attached to the written submissions.

6. The contract between the parties herein was entered on 22/03/2011. It is agreed by both the Appellant and the Respondent that the Appellant harvested the plant crop and the first ratoon crop. The Respondent contended that the Appellant failed to harvest the second ratoon crop. Given that the first ratoon crop was harvested in November 2013 then the second ratoon crop was expected to be ready for harvesting anytime from February 2015 in accordance with Clause 1 of the contract.

7. The Appellant defended the Respondent's claim. It called adopted its evidence in *Migori Chief Magistrate's Court Civil Suit No. 2698 of 2015* which was the subject of **Migori High Court Civil Appeal No. 10 of 2019** (supra). The Appellant had taken the position that it was not duty-bound to harvest the cane but the Respondent.

8. There is however an interesting turn of events in this matter. Despite taking the said position, the Appellant came up with a different position in its submissions. It contended that it harvested the cane on 19/09/2012 and duly paid the Respondent the value thereof. The Appellant alleged that it had annexed such evidence in its submissions, but in vain.

9. I must take a great exception to the new position. First, the Appellant never pleaded and proved the allegation. It is hence a non-issue (See

the Supreme Court ruling in **Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR** and the Court of Appeal decision in **The Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR).** Second, the alleged statement was only filed in the lower court suit but it was not produced as an exhibit since the Appellant opted to adopt the evidence of its witnesses in *Migori Chief Magistrate's Court Civil Suit No. 2698 of 2015.* A document filed in a civil suit but not formally produced as an exhibit does not form part of the evidential record in that suit. Such a document is not tested in cross-examination and as such cannot be relied upon as a basis of a decision. (See the Court of Appeal in **Kenneth Nyaga Mwige v Austin Kiguta & 2 others (2015) eKLR**). The Appellant must have been well aware of the repercussions of adopting the evidence adduced in *Migori Chief Magistrate's Court Civil Suit No. 2698 of 2015* without an appropriate order on the production of documents. The two suits were distinct and more so based on breach of different contracts. Third, the Appellant was attempting to adduce additional evidence on appeal. A party wishing to adduce additional evidence on appeal must strictly comply with the law. The approach taken by the Appellant in introducing the statement at the submissions stage on appeal is devoid of legal basis.

10. As a result of the foregone the allegation of the Appellant having paid for the value of the second ratoon crop cannot stand.

11. Having so found, it follows that the Appellant was in breach of the contract.

12. In the face of such breach the Respondent was entitled to compensation. In **Migori High Court Civil Appeal No. 10 of 2016 South Nyanza Sugar Co. Ltd vs. Joseph O. Onyango (2017) eKLR** I found that once a farmer proves that the Miller failed to harvest the plant crop at maturity then the farmer is entitled to the proceeds of the plant crop as well as the ratoon crops subject to the pleadings. Equally, when a Miller fails to harvest the first ratoon crop then the farmer is entitled to compensation for the first and second ratoon crops subject to the contract.

13. The foregone is however subject to the legal position that disputes based on breach of contracts are subject to the principles of ***remoteness, causation*** and ***mitigation***. However, the principles must be proved for applicability. (See

Migori High Court Civil Appeal No. 74 of 2018 South Nyanza Sugar Co. Ltd vs. Rehema Joseph Nkonya (unreported).

14. In this case the Respondent prayed for the proceeds of the second ratoon crop. Accordingly, and in view of the breach of the contract, the Respondent was entitled to such compensation.

15. The trial court awarded the sum of Kshs. 62,208/= for the second ratoon crop. On the yields, the court settled for the average yields between what the parties had claimed. The Appellant claimed the yields were 8 tonnes whereas the Respondent claimed it was 40 tonnes instead. The court adopted the average figure of 24 tonnes based on the law of averages. I however note that the Respondent had produced an expert report on yields prepared by the KESREF. That was the best guidance on the yields. However, since there is no counter-appeal I rest the matter there. There was no dispute on the size of the land. The price of the cane was as per the Cane Schedule prepared by the Sugar Directorate and which was produced in evidence. The court took into account the relevant deductions. The court did not therefore err in its computation of the value of the second ratoon crop.

16. Having dealt with the issues raised in this appeal, and given that none of the grounds of appeal is successful, the appeal is hereby dismissed with costs.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 5th day of March 2020.

A. C. MRIMA

JUDGE

Judgment delivered in open court and in the presence of: -

Mr. Oyagi, Counsel instructed by the firm of Oyagi, Ong'uti, Magiya & Co. Advocates for the Appellant.

Mr. Odhiambo Kanyangi, Counsel instructed by the firm of Messrs. Odhiambo Kanyangi & Company Advocates for the Respondent.

Evelyne Nyauke – Court Assistant